No. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OPPOSING MOTIONS TO AFFIRM

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Appellants Robert A. Rucho, David R. Lewis, Timothy K. Moore, and Philip E. Berger

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INTRODUCTION

As this Court stated mere months ago, partisan gerrymandering cases "concern[] an unsettled kind of claim," "the contours and justiciability of which are unresolved." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). In the decision below, with the ink on *Gill* barely dry, the district court purported to divine what has eluded this Court for decades: a justiciable test for adjudicating partisan gerrymandering claims. In fact, the court discovered *four* tests in *four* constitutional provisions, including two in the Elections Clauses of Article I—which had long been understood to empower state legislatures, not federal judges. That extraordinary decision would routinely place federal courts in the middle of partisan disputes without any textual justification or anything approaching judicially manageable standards. The decision plainly merits plenary review. Indeed, the *League* plaintiffs "acknowledge[]" that "full briefing and argument" is appropriate, as do the *Common Cause* plaintiffs. LWV.Mot.6; CC.Mot.41.

Plenary consideration is particularly warranted given that *plaintiffs* reject key aspects of the district court's decision and each other's contentions. Plaintiffs disagree about who has standing based on "dilutionary" injuries; the *League* plaintiffs decline to defend the district court's holding that "non-dilutionary" injuries suffice; the *Common Cause* plaintiffs are not sold on all elements of the court's four partisan gerrymandering tests; and the *League* plaintiffs ignore three of the four tests. Plaintiffs' motions thus confirm what is already plain on the face of the district court's 321-page opinion: If there really

is a coherent theory of standing to govern these cases, and if there really is a test capable of separating unconstitutional partisan gerrymandering from the run-of-the-mill consideration of politics, each will have to come from this Court.

I. Plaintiffs Lack Standing.

Plaintiffs' issues with the district court's decision begin at the threshold. According to the district court, at least one plaintiff in all 13 North Carolina congressional districts adequately pled a "dilutionary" injury, and plaintiffs in 12 districts proved such injury, because "hypothetical" maps could distribute likely Democratic and Republican voters more to plaintiffs' liking. JS.App.50-51. Moreover, as a result of purported "non-dilutionary" injuries, the court concluded that numerous plaintiffs have standing to challenge the 2016 Map as an undifferentiated whole. JS.App.74, 83.

Even plaintiffs cannot bring themselves to fully embrace that reasoning. The *League* plaintiffs concede, for example, that the district court was wrong to conclude that plaintiffs from CD3—Richard and Cheryl Taft—have suffered "dilutionary" injuries, LWV.Mot.24, as there was no meaningful difference in anticipated political breakdown under the 2016 Map as compared to plaintiffs' ideal "hypothetical" map, Plan 2-297, *see* Dkt. 130-2 at 11. The *League* plaintiffs also reject the district court's conclusion that plaintiffs suffered "dilutionary" injuries in CD10 and CD11, conceding that "[n]o plaintiffs living in these districts ... were uncracked by the alternative map on which the League relies." LWV.Mot.9. And the

League plaintiffs do not contest the district court's holding that CD5 was not a partisan gerrymander.

That leaves the *League* plaintiffs defending the district court as to only nine districts, and they maintain that at least one unidentified "League member" is suffering "dilutionary" injury in each. LWV.Mot.22. But those members are unidentified for good reason: The district court never addressed the *League* plaintiffs' standing in those nine districts, presumably because it is not even clear who those "League members" are, let alone what they believe their injuries to be. Dkt.129-1.[1] The court instead focused almost exclusively on "dilutionary" injuries purportedly suffered by the *Common Cause* plaintiffs. CC.Mot.36. But most of those plaintiffs are just like the Tafts: They would be in materially identical districts even under "hypothetical" maps. Dkt. 130-2 at 11. Indeed, by plaintiffs' own telling, only three districts would have been likely to switch to Democratic under Plan 2-297. JS.21 n.4.[2]

It is difficult to see how plaintiffs living in districts projected to remain red or blue even under their own preferred map can claim to have suffered

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[1] With the possible exception of CD1, the "League members" are not the named plaintiffs. LWV.Mot.10-13.

[2] The *League* plaintiffs find it "speculati[ve]" that voters could vote for candidates from different parties in successive elections. LWV.Mot.20. The 2018 elections prove otherwise. CD9, for example, had a predicted Republican vote share above 56%, Dkt.130-2 at 11, but an actual Republican vote share of 49.25% in 2018, N.C. State Board of Elections & Ethics Enforcement, *11/06/2018 Unofficial Local Elections Results—Statewide*, https://bit.ly/2JD5HjT (last visited Nov. 19, 2018).

"concrete and particularized injuries." *Gill*, 138 S. Ct. at 1934. Instead, any "injuries" such plaintiffs suffer can be rooted only in a desire to see more Democrats elected to Congress—*i.e.*, noncognizable "generalized partisan preferences." *Id.* at 1933. Indeed, while the *Common Cause* plaintiffs accuse appellants of "[i]gnoring the pleadings," CC.Mot.17, it is telling that the first "concrete[] and particularized injury" alleged in their complaint is that "[t]he 2016 Plan has made it more difficult ... for a Democratic candidate to be elected ... to the House of Representatives," Dkt.12 at 26.

Plaintiffs insist that if they lack standing, then so too must plaintiffs in one-person-one-vote or racial gerrymandering cases. CC.Mot.20. But being placed in a district that is packed with *too many voters* dilutes one's vote in a very concrete and district-specific sense: That vote is worth less than the vote of someone in the district next door. Likewise, being placed in a district on the basis of race subjects one to precisely the kind of race-based decision-making that the Fourteenth Amendment prohibits. There simply is no constitutional analog for the purported injury of being placed in a district that "dilutes" one's ability to help her preferred political party win more seats in the state's congressional delegation.

The *League* plaintiffs, for their part, focus on race-based vote dilution cases. LWV.Mot.21-25. But those cases are not concerned with "vote dilution" in some abstract or inconsequential sense. They assess whether a map "impairs the ability of a protected class to elect its candidate of choice." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994). Thus, even setting aside

the problem that neither Democrats nor Republicans can plausibly claim to be "a protected class," those cases are entirely consistent with the proposition that packing and cracking alone is not enough; there must be a demonstrable impairment of each plaintiff's ability to elect his or her candidate of choice.

Perhaps recognizing that their "dilutionary" injuries cannot get the job done, the *Common Cause* plaintiffs maintain that their "non-dilutionary" injuries give them standing to challenge the entire 2016 Map. CC.Mot.20-23. But they cannot explain why these exceedingly abstract injuries should get them in the door when they would not suffice in any other voting-rights context. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

II. Plaintiffs' Claims Are Nonjusticiable.

Plaintiffs' justiciability arguments fare no better. For decades, both lower courts and litigants in partisan gerrymandering cases have been "wandering in the wilderness," *Vieth v. Jubelirer*, 541 U.S. 267, 303 (2004) (plurality op.), because no majority of this Court has ever agreed upon a standard for adjudicating such claims. That is because no such standards exist, as the Framers neither envisioned federal courts wading into such politically fraught waters nor provided them with the tools to do so successfully. JS.23-28. But at a minimum, there can be no serious dispute that the justiciability question remains unresolved, which is reason enough to set this case for plenary consideration.

The *League* plaintiffs resist that proposition, insisting quite remarkably that this Court has already resolved the question in their favor, and that it would

be "implausible" to hold partisan gerrymandering claims nonjusticiable when racial vote dilution claims are justiciable. LWV.Mot.26-27. That would seem to be news to everyone involved in last Term's partisan gerrymandering cases, where the Court itself reviewed the same body of cases and concluded that they "leave unresolved" both "what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill*, 138 S. Ct. at 1929. Moreover, there is nothing remotely "implausible" about reaching different justiciability conclusions in cases involving the inherently suspect consideration of race versus the all-but-inevitable consideration of politics. After all, the Reconstruction-era Amendments were all about prohibiting racial discrimination by state and local governments, while no text embodies a concern with, let alone articulates a limit on, undue partisanship. As five members of this Court emphasized in *Vieth* in rejecting the same false equivalence, "[r]ace is an impermissible classification," while "[p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *see also id.* at 286 (plurality op.) ("segregating voters on the basis of race is not ... lawful").

The *Common Cause* plaintiffs make the equally remarkable assertion that this Court need not concern itself with justiciability because the political question doctrine does not apply to "[c]ases implicating 'the federal judiciary's relationship *to the States*.'" CC.Mot.23 (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)). That radical proposition cannot be squared with a host of settled precedents, including *Coleman v. Miller*, 307 U.S. 433 (1939), and numerous

Guarantee Clause cases that remain good law, or with the views of numerous members of this Court that partisan gerrymandering claims are (or at least may well be) nonjusticiable, *see Vieth*, 541 U.S. at 306 (plurality op.); *id.* at 309 (Kennedy, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring). Indeed, even Justices who would find such claims justiciable have never embraced the proposition that nonjusticiablity principles are simply irrelevant here. The claim is also at odds with the relevant constitutional text, which not only underscores that the Constitution sometimes commits powers and responsibilities to the States, but also commits the ultimate control over *congressional* districts to Congress. *See* U.S. Const. art I, §4. More broadly, the notion that this case is not about the separation of powers blinks all reality.

The *Common Cause* plaintiffs insist that there must be judicially manageable standards to police partisan gerrymandering under the First Amendment, the Equal Protection Clause, and the Elections Clauses because there are judicially manageable standards to adjudicate *other* types of claims under (at least some of) those provisions. CC.Mot.24. But none of the standards that have been crafted to deal with very different kinds of claims is equipped to answer the thorny question of "how much is too much." Indeed, the *Common Cause* plaintiffs do not suggest otherwise. Instead, they maintain that the Court does not need to answer that question because districting for partisan advantage is *always* impermissibly "invidious." CC.Mot.25. That position may have the virtue of simplicity, but it suffers from the insuperable vice of having been unanimously

rejected by members of this Court for decades. JS.29-30.

Lastly, plaintiffs contend that this Court need not resolve "the general justiciability of partisan gerrymandering" claims to hold *this* map unconstitutional. LWV.Mot.31; CC.Mot.25-27. That is nonsensical. This Court cannot plausibly declare any map "the worst of the worst" without first deciding what (if anything) makes a partisan gerrymander more or less constitutionally bad. After all, "[n]o test" for resolving a partisan gerrymandering claim "can possibly be successful unless one knows what he is testing *for*." *Vieth*, 541 U.S. at 297 (plurality op.).

In all events, the notion that the 2016 Map "reflects *no* policy, but simply arbitrary and capricious action," LWV.Mot.31, is belied by the reality that "reasonable efforts" to "maintain the current partisan makeup" was but one of *seven* factors guiding the redistricting committee, *five* of which passed unanimously. JS.App.20. Accordingly, this simply is not the mythical case in which all traditional districting criteria were abandoned in blind pursuit of maximum partisan advantage. *See* JS.36-37. To the contrary, just like every other partisan gerrymandering case, this case can be resolved only by first answering the "original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.).

III. This Case Confirms That "Limited And Precise" Partisan Gerrymandering Tests Do Not Exist.

Identifying a judicially manageable test for adjudicating partisan gerrymandering test has

"confounded the Court for decades." *Gill*, 138 S. Ct. at 1933. Apparently plaintiffs have not found that task any easier. Notwithstanding the smorgasbord of tests that the district court offered, plaintiffs cannot agree that even a single one of them cracks the code. The *League* plaintiffs simply ignore three of the four tests the district court crafted, and embrace only the equal-protection-based test (which they maintain coincidentally "also captures the First Amendment injury of viewpoint discrimination," LWV.Mot.32). The *Common Cause* plaintiffs, by contrast, embrace the district court's three *other* tests, but protest that its equal protection test is "too demanding" because it requires something more than "demonstrable invidious intent" (*i.e.*, intentional districting for partisan advantage). CC.Mot.37, 39.

That plaintiffs themselves cannot even agree on how partisan gerrymandering claims should be adjudicated "goes a long way to establishing that there is no constitutionally discernible standard." *Vieth*, 541 U.S. at 292 (plurality op.). But at a minimum, the fact that neither set of plaintiffs is even willing to wholeheartedly defend the district court's reasoning confirms beyond doubt that the decision below cannot be the last word on the subject.

Equal Protection Clause. While the district court posited that *any* intent to district for partisan advantage should suffice under the intent prong of its equal protection test, the court "assume[d]" a "predominant purpose" standard governs. JS.App.118-19, 145-46 (emphasis omitted). Plaintiffs maintain that a predominance standard would work here because the Court has applied it in other

contexts. CC.Mot.30; LWV.Mot.33-34. But that ignores the problem that redistricting is "root-and-branch a matter of politics," which means "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." *Vieth*, 541 U.S. at 285-86 (plurality op.). Not so for racial gerrymandering, which is "much more rarely encountered." *Id.* at 286.

The court's effects prong—which measures whether a representative will "feel a need" to respond to opposing-party constituents, JS.App.152—is even more unwieldy, as it never purports to explain how much "non-responsiveness" is too much or what evidence suffices to prove it.[3] The *League* plaintiffs disavow the need for linedrawing, LWV.Mot.34—a curious position when the task is to identify a "limited and precise" test, *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring). Meanwhile, the *Common Cause* plaintiffs criticize the "effects" prong as "too demanding," and insist that an "invidious-intent requirement" alone can "appropriately limit judicial intervention." CC.Mot.37.

Finally, no plaintiff seriously grapples with the "justification" prong of the test. The test preserves a district drawn with partisan advantage in mind only if the "discriminatory" effects are attributable to a "legitimate state districting interest." JS.App.152-53.

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[3] For example, the court found the effects prong satisfied in CD9, but in the 2018 elections, the Republican candidate won only 49.25% of the vote, while the Democratic candidate won 48.93%. *See* n.2, *supra*. It is unclear why the winner will not "feel a need" to respond to Democrats even in the unlikely event that constituents self-identify as such in seeking help.

But in the district court's view, "the Constitution does not authorize ... partisan gerrymandering," rendering this supposed escape hatch impossible to satisfy. JS.App.118. And even if this "justification" prong is not illusory, it is simply a convoluted and unjustified means of shifting the burden of proof to the defendants.

First Amendment. The First Amendment test fares no better, and the *League* plaintiffs wisely do not endorse it. Unlike in the equal protection context, the district court fully embraced the idea that *any* intent to district for partisan advantage is constitutionally suspect under the First Amendment—a notion that, as Judge Osteen recognized, runs counter to this Court's whole line of partisan gerrymandering cases. JS.App.343-46. The *Common Cause* plaintiffs insist that this test "would not banish all political considerations from the redistricting process," but would ban only "invidious" discrimination. CC.Mot.28-29, 35. But that is a false promise, as they freely admit that they consider *any* degree of districting for partisan advantage "invidious" discrimination. CC.Mot.28.

The "effects" prong likewise provides no constraint, as it requires nothing more than injuries as generic as struggling to "galvanize" participation in elections. JS.App.290. The *Common Cause* plaintiffs applaud the district court's refusal to adopt a "heightened 'effects' showing," maintaining that "'[t]his Court's decisions have prohibited' state action that unjustifiably burdens First Amendment rights, however slight[ly]." CC.Mot.35. That is precisely the limitless reasoning that led the *Vieth* plurality to

recognize that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting." 541 U.S. at 294 (plurality op.).

Elections Clauses. The *Common Cause* plaintiffs likewise stand alone in defending the district court's Article I tests. Indeed, no other court has ever accepted the proposition that partisan gerrymandering "exceed[s]" the State's districting powers or deprives "the People" of their right to elect representatives. JS.App.35. That is likely because it strains credulity to claim that the very same constitutional text that "clearly contemplates districting by political entities" is the font of the ever-elusive administrable test for adjudicating partisan gerrymandering claims. *Vieth*, 541 U.S. at 285-86 (plurality op.).

Cook v. Gralike, 531 U.S. 510 (2001), does not suggest otherwise. CC.Mot.38-39. While *Gralike* might have been instructive had the General Assembly passed legislation that branded opposing Democrats "tax-and-spend-liberals" on ballots, 531 U.S. at 525, it is hard to see how a case that says nothing about partisan gerrymandering is relevant here. Indeed, just a few Terms after *Gralike*, the *Vieth* plurality emphatically rejected an Elections Clause claim, and only Justice Stevens even mentioned *Gralike*—in footnote 26 of his dissent. JS.35.

* * *

The parties here may disagree on many things, but all agree this case should be set for plenary consideration. And rightly so, as almost every critical feature of partisan gerrymandering cases remains

"unresolved" by this Court. *Gill*, 138 S. Ct. at 1934. The Court should set this case for briefing and argument to put an end to the uncertainty that has plagued this area of the law for a generation.

CONCLUSION

The Court should set this case for plenary consideration.

Respectfully submitted,

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

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